ADVISORY COMMITTEE ON BANKRUPTCY RULES

Amended Minutes of the Meeting of January 19 - 20, 1989

The Advisory Committee on Bankruptcy Rules met in San Francisco, California, in the Jury Assembly Room of the United States District Court. The following members were present:

District Judge Lloyd D. George, Chairman
Circuit Judge Edward Leavy
District Judge Thomas A. Wiseman, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Ralph R. Mabey, Esquire
Joseph G. Patchan, Esquire
Herbert P. Minkel, Jr., Esquire
Bernard Shapiro, Esquire
Professor Lawrence P. King
Professor Alan N. Resnick, Reporter

The following additional persons also attended the meeting:

District Judge Morey L. Sear, Chairman of the Committee on the Administration of the Bankruptcy System, who attended the January 19 session
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court for the Eastern District of California
Gordon Bermant, Research Division, Federal Judicial Center
Barbara G. O'Connor, Senior Counsel, Executive Office for United States Trustees, U.S. Department of Justice

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in

the office of the Secretary to the Committee on Rules of Practice and Procedure.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

Changes in Dates of Next Two Meetings

The Committee voted to **change the dates of its next two meetings** to accommodate scheduling conflicts involving several members. The places of the meetings will remain the same. The dates of the next two meetings are:

March 16 - 17, 1989 --- Phoenix

May 17 - 19, 1989 --- Seattle

Approval of Minutes of November 1988 Meeting

The minutes of the January 1989 meeting were approved subject to the addition of Harry Dixon's name to the attendance list and a change to the item concerning class proofs of claim reflecting that the Reporter had telephoned rather than written to the Solicitor General's office.

Revision to Rule 9006(a)

Chairman George introduced the discussion by noting that the other advisory committees had withdrawn their proposed revisions on the computation of time, leaving only the Advisory Committee on Bankruptcy Rules still proposing a change. The decisions of the other advisory committees were based on negative public comment they had received. Judge George said that

so far as he knew the Committee still supported the proposed change in the bankruptcy rule, which would permit intervening weekends and holidays to be excluded from the computation only of time periods of eight days or less, rather than from periods of eleven days or less as the present rule provides.

The Reporter noted that the proposed Committee Note adopted by the Committee at its September 23, 1988, meeting would have to be further revised in light of the decisions of the other Advisory Committees to withdraw their proposed rules. The first sentence of the second paragraph of the Note, at lines 12 through 17, would be deleted. In the succeeding sentence, the phrase "the present" would be substituted for the word "this," (referring to the amendment), on line 17.

The Reporter further noted that the bankruptcy committee also had received negative comment letters, but that these all appeared to be from general practitioners who were commenting on the proposed changes to all four time computation rules. The few letters which came from people actually familiar with bankruptcy practice, on the other hand, strongly supported the change.

The comments submitted by the American Bankruptcy Institute, in particular, pointed out that Rule 9006(a) affects not only time periods prescribed by the rules but also by "any applicable statute." This would include § 546(c) of the Code which affords a ten day period for reclamation of goods by a seller.

Ralph Mabey asked whether the withdrawal of the proposals concerning the other bodies of federal rules ought to induce the Committee to reconsider. Professor King observed that the bankruptcy rule on the subject had been different until 1987, so that the present uniformity with the equivalent civil rule was less than two years old. Judge Mannes said that Judge Jones had

asked him to transmit to the Committee her view that all of the federal rules should be uniform on this matter.

In response, the Reporter said that the bankruptcy rule change is the only one being proposed on the basis of a perceived problem in the practice. The other advisory committees had gone along in the interest of uniformity, but will not maintain it in the face of strong objection from their constituency of practitioners.

In addition, the other federal rules do not contain the critical ten day periods found in the Bankruptcy Rules. The appeal period in a civil case, for example, is 30 days; excluding weekends and holidays from the computing of periods shorter than eleven days thus does not affect the running of the time for filing a civil appeal. The many ten day periods prescribed in the Bankruptcy Code and Rules, on the other hand, as well as those found in the Uniform Commercial Code and other state laws which may apply in a bankruptcy case, fully justify a bankruptcy rule which ensures uniformity of bankruptcy practice, even if this is achieved at the sacrifice of potential uniformity with other bodies of rules.

A motion to reaffirm the Committee's support of its prior recommendation to change Rule 9006(a) to reduce from eleven days to eight days the time period from which intervening weekends and holidays may be excluded in computing the time, and approving the revision of the Committee Note, carried, with all present either voting in favor or abstaining. Judge Jones was recorded as opposing the motion.

Chairman George submitted the Committee's recommendation to the standing Committee on Rules of Practice and Procedure on January 20. Following the lunch break that day, Judge George reported that the standing Committee had approved the Committee's recommendation.

Consideration of Style Committee Draft

Judge George invited the members to raise any matter relating solely to style changes, but said that, absent such a request, discussion of the draft would be limited to the issues identified by the style committee as substantive. All references are to the style committee's draft, (hereafter, "Draft"), transmitted to the Committee on December 27, 1988.

Joseph Patchan said that in reviewing the draft he had noted a number of instances in which similar but not identical terminology is used. Absent a reason for the differences, he said, the same word or words should be used throughout the rules. As an example, the terms "file," "file with the clerk" and "file with the court" appear in the draft, apparently interchangeably. **He offered to work separately with the Reporter to identify these and make them consistent. The Chairman requested that Mr. Patchan proceed as he had suggested.**

The Reporter said his computer could speed the locating of such variations. With regard specifically to the word "file," he noted that Rule 5005 defines "filing," and that any potential confusion over papers destined for the United States trustee had been cleared up by earlier decisions to use the word "transmit" in connection with them. Accordingly, usage in the rules probably should be restricted to "file," except when the rules direct filing a paper with the district court clerk.

The Reporter accepted two corrections to the Draft requested by Ralph Mabey: 1) at page 5, line 17, deletion of the final "s" from the work "indicates," and 2) on page 24, line 15, deletion of the word "only."

Herbert Minkel said he would like the opportunity to review these additional style corrections. **The Reporter said he would**

work out a means of showing these separately from the earlier style changes and would circulate an updated draft prior to the next meeting.

Rule 2002(i). The style committee had recommended and drafted a sentence limiting the notices to be sent to a committee of retired employees appointed pursuant to § 1114 of the Code to "such notice[s] as the court may direct." See, Draft, page 22.

Proponents of the recommendation focussed on the expense to the estate of delivery and review by committee counsel of voluminous documents when the issue of modification of retiree benefits may never arise in the case. They pointed out also that in a large industrial case, there may be a separate retiree committee for each of several benefit contracts. Opponents noted that § 1114 gives committees appointed thereunder "the same rights, powers, and duties" as committees appointed under § 1102 and, accordingly, should be kept informed of all activity in the case.

Chairman George then tabled the matter and directed the members to study § 1114 and think about the statutory role of committees of retired employees in preparation for the next meeting. The style committee's recommendation will be placed on the agenda of the March meeting, together with consideration of any other rules in which it may be appropriate to provide for § 1114 committees.

The Reporter also raised the question of notice to committees in chapter 7 cases, which may be elected pursuant to § 705. **A motion that the rule be amended to provide that committees elected pursuant to § 705 receive the same notice as committees appointed under § 1102 carried unanimously. The precise language of the amendment will depend on the outcome of March vote concerning § 1114 committees.**

Rule 2003(b)(3). **The Committee approved the addition of the phrase "unless the court orders otherwise" at page 27, line 29, of the Draft and the corresponding addition to the Committee Note at page 29.**

Rule 2014. **The Committee approved the style committee's change at page 45, line 6, of the Draft providing specifically for the employment of professionals by § 1114 committees.**

Rule 4001. The recommendation here also would exclude § 1114 committees and elected chapter 7 committees from receiving notice of motions from relief from stay. Accordingly, **consideration was tabled.**

Committee Note to Rule 5009. The style committee's recommendation would delete from the Committee Note the previously approved sentence beginning at page 84, line 25, and would add to the sentence ending on line 33 language stating that the court "may order the United States trustee to file a certification or reasons why one cannot be filed."

Barbara O'Connor expressed the view that, since "the statute does not contain any waiver of sovereign immunity," the court could not order the United States trustee to file the certification. The committee, however, was of the opinion that the court's authority under § 105 of the Code extends to any actions necessary to close the case, as these involve carrying out the provisions of the Code. In addition, several members pointed out that the recommended language would require either the filing of a certification or a statement of reasons why the certification could not be provided, giving the United States trustee alternative means of complying which any such order.

Judge Sear expressed concern about the previously approved language immediately preceding the recommended addition. He said that this part of the sentence, which states that the court

may review the final report and account and determine whether the estate has been fully administered, appeared to invite the bankruptcy judge to become involved in the administration of the estate. Judge Barta, however, said the intent was merely to provide a backup method for getting cases closed.

The committee unanimously approved the recommendations of the style committee covering lines 25 through 33 of page 84. A suggestion to insert the word "submit" in front of the word "reasons" was accepted.

Rule 9001. The style committee recommended adding a new subsection (11) which would add to the definition of United States trustee any "assistant United States trustee." This new subsection is at page 100A of the Draft. **The Committee unanimously approved this addition.**

Miscellaneous Matters. The Reporter said that two previously approved changes had been left out of the Draft inadvertently. On page 58, line 9, the words "fixed by the court pursuant to Rule" should be inserted between the word "or" and the numerals "3003(c)." On page 83, line 11, the words "the United States trustee" should be deleted; the words "and shall be transmitted to the United States trustee" should be added on line 12 at the end of the sentence.

Professor Resnick also described several **stylistic changes** suggested informally to him by participants in the meeting, **all of which were approved by the Committee.**

* Page 61, line 7, restore missing "§" sign;
* Page 73, if language regarding § 1114 committees remains, the committees should be identified as being composed of retired employees, rather than retired persons;
* Page 73, line 10, change "adequate protection for" to "adequate protection of," to track statutory usage;

* Page 79, line 30, restore the word "should," presently marked for deletion;
* Page 91, conform the spelling of "time share," which appears three times in Rule 6006 and once in the Committee Note, to the single word "timeshare," the usage found in the Code. **The Reporter also said he believes the reference to timeshare interests is not needed in the Rule, as they are simply a form of executory contract. His proposal to delete it will be considered at the March meeting.**

Rule 2013. Patricia Channon suggested that a sentence be added to the Committee Note to the Rule, (page 44 of the Draft), stating that the clerk need not keep a record of fees to a standing chapter 12 trustee. The original Committee Note already includes this exception for standing chapter 13 trustees. The **Committee approved the addition of the following two sentences: "The rule is not applicable to standing trustees serving in chapter 12 cases. See § 1202 of the Code."**

Rule 1007(d). Herbert Minkel raised the notice problem encountered pursuant to Rule 4001 and others which require a moving party to give notice to the "creditors included on the list filed pursuant to Rule 1007(d)." The list of 20 largest creditors referred to in these rules is the list filed with the petition. As the case proceeds, however, this list becomes outdated through amendments, which may be frequent if there is active transferring of claims. At present, a time-consuming review of the entire docket is the only way to identify amendments to the list and may not yield a current list if the court's docket is not up to date. Moreover, even though many courts maintain a special short notice list, service to the entities it comprises does not fulfill the requirements of the rules which specify the "list filed pursuant to Rule 1007(d)," the outdated list filed with the petition.

The Reporter suggested that language could be added to the Committee Note to Rule 1007(d) stating that rules referring to the list filed pursuant to Rule 1007(d) shall mean the list as amended. The Note further might direct the clerk to respond to requests for the list by providing the list as amended.

Professor King inquired whether a method could be devised whereby the existence, dates and docket locations of amendments could be noted at the place on the docket where the original list appears. Richard Heltzel said he believed a minor change in the standard docket form prescribed by the Administrative Office could provide for such notations.

Chairman George requested Mr. Minkel to write a memorandum on this issue for the Committee's consideration at the March meeting. The Chairman also invited Mr. Heltzel to submit proposals for solving the problem.

Rule 4001 - Motions Pursuant to § 363(e)

The Reporter said he believes the Code limits the relief available to a creditor to relief from the stay (and return of the property) or an order prohibiting or conditioning its use by the debtor, a reiteration of the position taken in his memorandum and draft amendments of December 22, 1988. Under this view, a debtor who simply is holding the property for future sale is considered to be using it.

Herbert Minkel said there remains a "zone of vulnerability" for the creditor who has filed a motion for relief from stay but whose interest in the property the debtor is not insuring or otherwise protecting prior to the ruling by the court on the creditor's motion. This risk, however, appears to be one Congress intended for the creditor to bear.

The Committee approved, with one opposed, the amendments recommended by the Reporter which bring motions for relief pursuant to § 363(e) of the Code under the procedural governance of Rule 4001.

Reconsideration of Rule 5002

The Reporter described the developments leading to the reconsideration of this rule. Initially, the matter came before the style committee to resolve a discrepancy between the minutes of the July 1988 meeting and the Reporter's notes involving a transposing of the words "United States trustee" and "bankruptcy judge" in lines 8 and 9 of the proposed rule. A United States trustee who had obtained a copy of the draft, however, raised a question about the intended scope of prohibited appointments in the proposed amendments to Rule 5002(a).

Barbara O'Connor noted that, while the bankruptcy judge in a case clearly is a single individual, the proposed amendment to Rule 9001(11) expands the definition of United States trustee to include an assistant United States trustee. Thus an assistant serving in Albany could not appoint as trustee a relative of the United States trustee in New York City, even though the two offices have separate operations, because both individuals would be the "United States trustee . . . making or approving the appointment."

The earlier draft is ambiguous in the matter of employment of professionals employed by debtors in possession or committees when a United States trustee region covers a large area or when a national accounting firm or large law firm is involved. The United States trustee has no role in approving the employment of these professionals. Yet the draft rule could be interpreted to bar Price Waterhouse from serving in any case in New York if Price Waterhouse employs in its Dallas office an individual who

does no bankruptcy work but is a brother of the United States trustee for New York.

The Reporter said he was not sure the Committee had intended to be so restrictive and had prepared another draft which would clarify and provide separate treatment of those categories in which the United States trustee has no role. Professor King, however, said he believed the Committee had intended to restrict such employment and that such a policy is justified by the United States trustee's role in commenting on fee applications.

Summarizing the discussion, Chairman George said it is clear the rule must forbid conflicts of interest and yet not be too broad, that a proper balance must be achieved. It also is clear that any treatment of "improper" relationships must include appearances as well as actual conflicts. **The Chairman directed the Reporter to work on drafting a rule that would address all of these concerns.**

At the January 20 session, the Reporter presented a revised draft. Barbara O'Connor said the proposal still seemed too restrictive, especially as it would apply to assistant United States trustees in large regions and to the employment of such professionals as auctioneers, whose compensation traditionally is a fixed percentage of the sale price realized. The Reporter said the language reflected the Committee's concern about appearances and noted that he had provided for the judge to make a determination as to professionals that a particular employment is not improper in the circumstances presented. As to the appointment of trustees and examiners, on the other hand, the members had expressed strong support for a complete prohibition, with no "escape clause." **A motion to approve the new draft and Committee Note carried unanimously.**

Closing Chapter 11 Cases

The Reporter, in a memorandum dated December 9, 1988, had proposed amendments to Rules 3022, 2015 and 5009 to deal with the problem of chapter 11 cases remaining open for several years after confirmation with little or no judicial activity. The proposed amendments would permit a court to determine that an estate is fully administered and close a case after certain events had occurred, even though payments or other activities involving the debtor and its creditors might continue.

In addition to the administrative benefits to the court system, which would not have to carry these cases statistically or store voluminous inactive files, closing these cases would free creditors from the threat of litigation arising years after a plan has been confirmed and documents relating to prepetition transactions with the debtor have been destroyed.

Judge Barta said that he supported the purpose of the proposed Rule 3002, but that the requirement of findings on all seven factors enumerated in the rule would be very burdensome to bankruptcy judges. Richard Heltzel suggested that the rule instead could establish a date certain, an appropriate number of months after confirmation, after which the court would close the case absent a showing of cause for keeping it open.

Judge Leavy said it appeared from the discussion that there are too many variables in the process for the Committee to be able to articulate an authoritative rule. He made a motion that the Committee adopt a Rule 3022 which would be even more simple than the current one. It would say only: "After an estate is fully administered, the court on its own motion or on motion of any party in interest, shall enter a final decree in a chapter 11 reorganization closing the case." The remainder of the Reporter's draft would be transferred to the Committee Note as guidelines for the parties and the court. The rule and the Note

also would be supplemented by administrative guidance. The motion carried with one opposed.

Rule 2015(a)(7). The Reporter directed the Committee's attention to the changes he was recommending to this rule, on page 9 of the December 9, 1988, memorandum. These amendments would delete all of the detail the Committee already had rejected for Rule 3022. After consideration of the draft and **upon motion, the Committee voted unanimously to delete Bankruptcy Rule 2015(a)(7) entirely.**

2015(a)(6). At the November 1988 meeting, Harry Dixon had proposed deleting this rule, which requires the filing of post-confirmation reports. It appears that trustees and debtors in possession rarely comply with the rule. Moreover, § 1106(a)(7) of the Code already imposes a duty to make any reports that are either "necessary" or ordered by the court. **A motion to delete Rule 2015(a)(6) carried, with none opposed. The Committee Note will state that the rule is abrogated as unnecessary and refer to § 1106(a)(7).**

Rule 5009. As a corollary to the Committee's decision to treat the closing of chapter 11 cases in Rule 3022, the Reporter had proposed further amendments to Rule 5009, which now deals with certification by the United States. The proposed changes, which appear at lines 3-4 and 29-30 of page 12 of the memorandum of December 9, 1988, would make it clear that certification applies only to chapter 7, 12 and 13 cases and that chapter 11 case closing is governed by Rule 3022.

Judge Sear asked for the Committee's view of the role of the United States trustee in a chapter 11 case. The consensus was that the United States trustee acts in many ways prior to confirmation, appointing creditors committees, trustees and examiners, for example, but that after confirmation activity is limited to commenting on applications for final compensation.

The United States trustee takes no role in monitoring implementation of the plan or determining when administration is complete. This determination is left to administrative direction and the discretion of the court on a case-by-case basis.

The Committee approved the Reporter's recommendations to add the bold language on lines 3 and 4 and a new subdivision (d) on lines 29 and 30.

Miscellaneous Suggestions Concerning Parts I and II

Pursuant to a decision of the Committee at the November 1988 meeting, only those suggestions recommended for adoption by the Reporter were discussed. All references are to the Reporter's memorandum of November 17, 1988.

1. **The Committee approved the Reporter's recommendation to require filing of a list of postpetition debts in a converted case within 15 days after the conversion** rather than as part of the final report which is due in 30 days. The purpose of the amendment is to permit creditors to receive notice of the § 341 meeting in the converted case. **The Reporter will work on adding chapter 12 cases to the rule;** chapter 13 conversions are treated in a sentence not shown in the memorandum.

2. **The Committee approved the Reporter's recommendation to amend Rule 1019(7) to provide the same claims filing period for all creditors entitled to file in the converted case.**

3. **The Committee approved the Reporter's recommendation to delete from Rule 2002(b) the references to subdivisions (h) and (i).**

4. **A motion to reject the Reporter's recommendation concerning Rule 2002(f)(5) carried with one opposed.**

5. **A motion to leave Rule 2006 unchanged carried with one opposed.**

6. The Reporter recommended amending Rule 2016 to provide that a request for payment of an administrative expense should be made by motion. Bernard Shapiro said no request is needed for most administrative claims, as they arise from vendors and employees who are paid in the ordinary course. He said he was concerned that introducing such a rule would lead these persons to think they could not be paid without a motion.

Herbert Minkel agreed as to rehabilitation cases but said that liquidating chapter 11s pose a problem, which is aggravated by the provision in § 1141 discharging the debtor from all claims arising prior to confirmation of the plan. The plan must provide for payment of all administrative claims, but if any are not paid, the claimant may need procedural guidance on how to compel payment. Another troublesome area involves claims which arise post petition but are not incurred in the ordinary course of business, such as product liability claims. The rules are silent concerning how a person with such a claim obtains payment. Further problems arise when a creditors' plan is confirmed; administrative claimants such as reclaiming sellers may not be demanding immediate payment but want something in the record putting the plan proponent on notice of their claims.

Ralph Mabey observed that the American Bankruptcy Institute appeared to perceive a problem and had commented on this issue. He said there seemed to be a gap in the rules, that many people are mystified, and that he favored prescribing the simplest procedure possible, an application.

The Reporter suggested that a subdivision (c) could be added to the rule as follows: "Except as provided in subdivision (a), if the trustee has not made payment of an administrative expense, a request for an order compelling payment thereof shall

be by application." The implication would be that if there were no need to compel, the claimant would not need to file anything. Professor King said that, as Rule 2016 was being amended in other ways and a Committee Note would appear anyway, the Committee Note could be expanded with an additional paragraph noting the analogy between the types of claims provided for in the rule and other administrative claims which may be incurred outside the ordinary course of the debtor's business and for which a similar application procedure would be appropriate in making a request for payment. Herbert Minkel suggested that the title of the rule might need to be broadened to include the general term "administrative expenses," to assist persons seeking procedural help to find the information in the Committee Note.

Judge Leavy said that the legal definition of a motion is an "application for an order." In his view, calling the document to be filed an application is a distinction without a difference. Bernard Shapiro said the simplest procedure should be provided that will permit claimant to get on record, with a Committee Note to indicate what actions should be taken to compel immediate payment or dispute the claim.

A motion to make no change in the rule had been made early in the discussion. When the question was called, the motion failed by a vote of six to three. A motion to reconsider also failed by a vote of five to four.

Chairman George referred the issue to the Reporter to develop a procedure to deal with administrative claims and directed that the question be carried over to the March meeting. Judge Leavy requested that the members who discern a problem assist by proposing a remedy. Herbert Minkel and Bernard Shapiro undertook to pr ide the Reporter with recommended language.

The Reporter also directed the attention of the Committee to the further suggestion of Bankruptcy Judge Paskay that the rule impose a time limit for the filing of administrative claims. The Reporter noted that he had discussed this suggestion in the memorandum and recommended no action. There was no disagreement with this recommendation.

7. The Reporter explained that Rule 2017 differentiates between payments made to the debtor's attorney prior to the entry of the order for relief, (from funds which otherwise would be part of the estate and payable to creditors), and those paid after the order for relief, (out of the debtor's own funds). Any party in interest, including a creditor, may challenge payments that allegedly deplete the estate; only the debtor may seek relief from payments made from funds that do not become part of the estate. The present rule, however, establishes the boundary between the two motions as the "commencement of the case," thereby effectively depriving creditors in an involuntary case of the right to challenge a fee paid for an unsuccessful defense of an involuntary petition. The Reporter recommended substituting the term "order for relief" to give standing to creditors to challenge defense fees to the debtor's attorney in an involuntary case.

A motion to adopt the Reporter's recommendation carried by a vote of five to four. Professor King suggested that, on line 2 and line 10 of page 12, the correct language would be "entry of the order for relief."

Miscellaneous Suggestions Concerning Parts III and IV

Pursuant to a decision of the Committee at the November 1988 meeting, only those suggestions recommended for adoption by the Reporter were discussed. All references are to the Reporter's memorandum of December 1, 1988.

1. **A motion to leave Rule 3003(c)(2) unchanged carried.**

2. **The Committee adopted the suggested change to Rule 3003(c)(4) which would add the words "or Interest" to the caption.**

3. **The Committee adopted the suggested change to Rule 3004** which would tie the right of the debtor or trustee to file a proof of claim on behalf of a creditor to the relevant claims filing deadline, rather than to the first date set for the § 341 meeting. The Committee approved a style change deleting from line 1 of the proposed rule, (page 3), the words "on or."

Herbert Minkel made a motion incorporate into the Committee Note to the appropriate rule [3002] a paragraph stating that the Committee had considered and rejected a proposed amendment to make provision for the filing of class proofs of claim. Judge Leavy said that while he agreed that the Committee had rejected the suggested amendment authorizing class proofs of claim, he felt that it would be unwise to have a Committee Note saying the Committee rejected the idea, thus creating a "bit of legislative history" on a non-event. He stated that there is at least one circuit case holding that there can be no legislative history if Congress did not change the law. **The motion failed by a vote of six to two.**

4. The Reporter described the problem which the proposed amendment to Rule 3016(a) addresses. The difficulty arises when the hearing on the disclosure statement relating to a plan has been concluded but the plan cannot be confirmed. The amendment would permit other parties to file a plan until the conclusion of the hearing on another disclosure statement, without obtaining leave of court. [The rule deals only with plans filed after expiration of the debtor's exclusive period for filing a plan.] Ralph Mabey pointed out that the proposed amendment also would restore the right to file plans in the event the disclosure

statement is not approved. Professor King said the intent of the present rule is to permit the court to control the plan filing process. The present rule, however, does presume approval of the disclosure statement.

Herbert Minkel made a motion to approve the Reporter's draft subject to the following changes (Memorandum, page 4):

* Line 3, substitute "a" for "the" before the words "disclosure statement;
* Line 4, delete the (proposed) phrase "relating to another plan";
* Line 5, replace "the" with "such" before the words "disclosure statement;"
* Line 6, delete "other" and insert after the word "plan" the phrase "to which the disclosure statement relates,";
* Line 7, delete "of this rule."

The motion carried.

Judge Mannes noted that the Code permits the debtor to file a plan at any time and inquired whether the Committee Note mentions this right. The Committee discussed but took no action concerning whether potential confusion could be eliminated by deleting from the Note, (page 4, line 11), the phrase "other than the debtor" or simply by deleting the two commas bracketing the phrase. The original Committee Note states that § 1121(a) of the Code permits the debtor to file a plan at any time during the case.

Judge Leavy requested that the rule be redrafted to state what is being prohibited rather than listing several actions that may be taken, leaving the party to discern the only action that is forbidden (by the omission of that action from the approved list). Bernard Shapiro said he thought the amendments just approved would give the court an adequate tool to "monitor the traffic in plans." He said the rule also could be recast

along the lines suggested by Judge Leavy, but not by discussion around the table. Professor King suggested that, if the rule were to be redrafted, the event which cuts off the filing of further plans should be described as the "entry of an order approving the disclosure statement" rather than the conclusion of the hearing.

Following the lunch break, **the Reporter presented a new draft Rule 3016(a) and Committee Note as follows:**

Rule 3016

(a) TIME FOR FILING PLAN. A party in interest other than the debtor who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.

Committee Note

Subdivision (a) is amended to prohibit, without leave of court, the filing of plan by a party in interest if an order approving a disclosure statement relating to another plan has been entered and a decision on confirmation of the plan has not been entered. This subdivision does not prohibit a debtor from filing a plan.

A motion to adopt the new draft carried.

5. A suggestion had been made to amend Rule 3017(d) and require distribution of the disclosure statement and plan to only those creditors who are entitled to vote on the plan. Unimpaired classes (and those impaired classes who are deemed to

have rejected the plan) do not vote. A motion to reject the suggestion failed for want of a second. **Herbert Minkel then moved to amend the Rule 3017(d) to permit the court to determine that certain unimpaired classes need not receive copies of the plan and disclosure statement.** Absent such a determination, all creditors and equity security holders would receive the plan and disclosure statement. **This amendment inserts, after the words "disclosure statement" at lines 2 - 3 on page 6 of the memorandum, the words "unless the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders,".** Otherwise the rule would remain as it is at present, with none of the proposed additions shown on page 6. Professor King objected on the basis that members of unimpaired classes have a right to object to the plan but would be unable to do so because, under this amendment they would lack sufficient information to exercise this right. **The motion carried by a vote of four to two.**

6. Ralph Mabey made a **motion to adopt the Reporter's recommendations concerning Rules 3018(a),(b) and (d), which carried with two opposed.** Professor King observed that the term "class that is impaired" does not really work as a method of excluding non-voting classes, because an impaired class does not vote if its claims are wiped out by the plan. Ralph Mabey suggested substituting the phrase "class that is entitled to vote" throughout the rule. Several members suggested that rather than amending Rule 3018(a), the rule should be deleted entirely, as it appears to repeat the statute and merely brings together requirements of § 1126 with the further prerequisite that the claims have been allowed. The Reporter observed that parts (a)(2), establishing a record date for holders of claims and securities, and (a)(3), providing for the court to permit vote changes and temporarily allow claims for voting purposes, do not repeat the statute and probably should be retained. **The Chairman noted that there appeared to be much uncertainty over the issues raised and directed that the matter be carried over**

to the March meeting. A motion to reconsider the amendments made to the rule carried.

7. and 8. **Judge Leavy moved to reject the proposed amendment to Rule 3020(a). This motion also covered the proposed amendment to Rule 3020(b)(1). The motion carried. Upon further motion, however, Item 8. was reconsidered. A motion to adopt the proposed amendment to Rule 3020(b)(1) requiring objections to the plan to be served on the plan proponent carried.**

9. **A motion to adopt the proposed change to Rule 4008 carried.** The amendment changes the word "shall" in line 7 of Rule 4008, (Memorandum, page 14), to "may." This change will conform the rule to a statutory change enacted in 1986.

References in the Rule to the Chapter 13 Statement

The Reporter noted that the Committee soon would be considering proposed revisions to the Official Forms. These proposed revisions would abrogate the chapter 13 statement. The Reporter requested Committee approval to delete from the draft rules all references to the chapter 13 statement. If the Committee later should determine that some separate document is needed either for chapter 12 or chapter 13, that document could be made an appendix or exhibit to the statement of affairs, which would not need to be mentioned in the Rules. **A motion to approve deleting references to the chapter 13 statement carried.**

Rule 3001(e)

Herbert Minkel questioned the rationale for prescribing a different procedure for a claim transferred after the filing of a proof of claim than for a claim transferred before a proof of claim is filed. The present rule requires the court to become

involved in any claim transferred after filing of a proof of claim and to determine, after hearing upon notice, whether the transfer was unconditional and enter an appropriate order. Mr. Minkel said that in discussing the rule informally with members, he had been unable to discover a reason for this obligatory court involvement, even when the transferor has no objection. **He agreed to provide the Reporter with a memorandum. Chairman George requested that the memorandum to sent to Professor Resnick by February 15.**

Rule 9027(b) Removal Bonds and Repeal of 28 U.S.C. § 1446(d)

Patricia Channon reported that the General Counsel of the Administrative Office had distributed to all district court clerks and all bankruptcy court clerks a memorandum, dated January 5, 1989, informing them of the repeal of 28 U.S.C. § 1446(d), the subsection of the civil removal statute which required the removing party to post a bond. The memorandum states that bonds no longer are required in removed cases.

Bankruptcy removals, however, are governed by a different statute, 28 U.S.C. § 1452, which makes no mention of bonds. Bankruptcy Rule 9027(b) imposes a bond requirement except when the applicant is a trustee, debtor, debtor in possession or the United States. As the authority for removals in bankruptcy cases is § 1452 rather than § 1446, there is a question whether repeal of § 1446(d) affects the bankruptcy rule.

The consensus was that Bankruptcy Rule 9027(b) is not affected, that General Counsel should be instructed to notify the bankruptcy clerks that the January 5, 1989, memorandum is wrong and that Bankruptcy Rule 9027(b) is still in effect. The **Committee approved Judge Wiseman's suggestion that this be done by letter from the Chairman.**

Requirement of Open Meetings

The Committee reaffirmed its policy of interpreting the open meetings provision of 28 U.S.C. § 2073(c)(1) as requiring only that the Committee permit members of the public to observe the meeting. The Committee does not agree that public participation in meetings must be allowed. The Committee retains the option to permit participation by a particular individual or group on a case-by-case basis. In addition, anyone may speak at any public hearings on published drafts and may communicate with the Committee in writing at any time.

Circulation of Committee Drafts

Chairman George cautioned the members about circulating drafts of rules which the Committee is still working on. Even though the meetings now are open and interested persons also may obtain copies of the minutes, circulation of drafts prior to publication of the rules for public comment appears to be creating problems. Drafts of materials from earlier meetings may create misunderstandings among persons who are not aware of changes made in later drafts. He requested the members to exercise prudence, especially concerning issues still being debated by the Committee.

Respectfully submitted,

Patricia S. Channon

Dated: March 21, 1989